Supreme Court, U.S.
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No. 93-2030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LIZZIE DURDEN, in her capacity as Administratrix of the Estate of Mary Freeman, deceased,

Petitioner,

v.

DeKALB COUNTY, GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether just compensation includes the value of improvements made by a local government entity before filing of condemnation proceedings?

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STATEMENT OF THE CASE

The historical context in which DeKalb County acquired the tax deed to the 30-acre tract began in 1945. In that year B.F. Anderson conveyed a larger tract of unimproved property to Jim and Mary Freeman. Mr. Anderson purported to except from the conveyance a 30-acre tract. Almost fifty years later, the ownership

of the 30-acre tract became a matter of dispute in this condemnation litigation with the heirs of B.F. Anderson (the "Reynolds family") and Mary Freeman (and later her heirs represented by Petitioner Durden) asserting competing claims of ownership.

The ownership dispute was resolved earlier this year in favor of Petitioner Durden and against the Reynolds family by a ruling of the Supreme Court of Georgia that the description of the excepted 30-acre tract was so vague as to be void. That ruling was accepted by the Reynolds family as final and is not before this Court. (Opinion of Supreme Court of Georgia – Appendix III to Petition for Certiorari, p. 10a.)

The petition for certiorari involves only seven (7) acres of the 30-acre tract and presents the question whether a condemnation award to Petitioner Durden, should include the value of a garbage collection facility constructed by DeKalb County on the 7-acre tract before initiation of a condemnation proceeding in 1991. The Supreme Court of Georgia decided that question in favor of DeKalb County. Petitioner Durden seeks review of that decision by this Court.

ACQUISITION OF TAX DEED BY DeKALB COUNTY

From 1959 to 1972 property taxes on the 30-acre tract were paid by George Anderson, a nephew of B.F. Anderson. Apparently he believed that tract to be the 30-acre tract excepted by his uncle in the 1945 conveyance to Jim and Mary Freeman. However, neither he nor anyone else paid the taxes in 1973 or 1974, so the County initiated a tax sale. The County sent George Anderson notice of the tax sale, believing him to be the owner of the 30-acre tract because he had paid the taxes from 1959 to 1972.

The tax sale took place in 1976. There being no other bidder, the County purchased the 30-acre tract for $780.49, the amount of the delinquent taxes then due and payable.[1] Following a tax sale, the owner may reacquire title by "redeeming" the property from the tax sale by paying a redemption price to the successful bidder within twelve months after the tax sale.[2] No one redeemed the property during the redemption period following the tax sale and, consequently, the defeasible title of DeKalb County became absolute. Although the County did not do so, under Georgia law it could have conveyed good title of the 30-acre tract to a third party after its defeasible title became absolute. *Durham v. Crawford,* 196 Ga. 381, 26 S.E.2d 778 (1943).

PETITIONER DURDEN'S EJECTMENT ACTION

Mary Freeman became aware of the tax deed in 1984 when she was asked to sign a quitclaim deed by a party seeking to purchase the property from the County. She then contacted the County, contending that the 1976 tax sale to the County was void and that she owned the 30-acre tract. On the basis of an independent title examination, the County concluded that the owners of the 30-acre tract at the time of the tax sale had been the heirs of B.F. Anderson (i.e., the Reynolds family) and, therefore, Mary Freeman had no standing to object to the tax sale.

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[1] Under Georgia law a county may purchase real property offered for sale by virtue of tax executions. However, a county may bid only when other bids do not cover the amount of the tax execution and its bid may not exceed the amount of the tax execution and costs. See O.C.G.A. §48-4-20.

[2] The redemption price is the amount paid for the property at the tax sale plus an annual premium of a certain percentage and costs. O.C.G.A. §48-4-42.

Mary Freeman then filed a wrongful possession action in Federal court in 1985. She died while that suit was pending, and the suit was dismissed by Petitioner Durden, named successor plaintiff as administrator of her mother's estate.

In January of 1987 Petitioner Durden, on behalf of Mary Freeman's estate, filed an ejectment action naming only the County as defendant. The Reynolds family was not named a defendant although Petitioner had knowledge of their competing claim to ownership of the 30-acre tract.

In September of 1987, while the ejectment action was still pending in the trial court, the County began construction of the garbage collection facility on about seven (7) acres of the 30-acre tract and completed construction in November 1989. In January 1990 the trial court held the County's tax deed void, on the ground of excessive levy, and entered an order granting possession of the 30-acre tract to Petitioner Durden. The Supreme Court of Georgia affirmed the trial court's decision without opinion. Although Petitioner Durden had sought a judgment for title in the ejectment action, the trial court made no ruling on that issue (See Appendix I, p. 1a).

DeKALB COUNTY'S CONDEMNATION ACTION

In February 1991 the County filed a compaint for the condemnation of the 7-acre tract upon which the garbage facility was located (making no claim to the remainder of the 30-acre tract). Since the Reynolds family also claimed ownership to the property, the County named both Petitioner Durden and the Reynolds family as condemnees and asked the court to resolve the ownership dispute.

The trial court denied condemnee Durden's motion for summary judgment as to the ownership dispute with the Reynolds family and granted the County's motion for partial summary judgment, holding that she was not entitled to the value of improvements placed upon the 7-acre tract by the County (Order Granting Condemnor's Motion for Partial Summary Judgment – Appendix to Petition for Certiorari, p. 12a).

Condemnee Durden appealed both orders, one to the Supreme Court of Georgia and the other to the Court of Appeals of Georgia. Both appeals were consolidated with the Supreme Court of Georgia on February 28, 1994, reversing the trial court on its denial of condemnee Durden's motion for summary judgment as to the ownership question and affirming the trial court on its grant of the County's motion for partial summary judgment as to the value question. (Opinion and Judgment of the Supreme Court of Georgia – Appendix III to the Petition for Certiorari, p. 4a.)

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Contrary to the claim of Petitioner, neither the decision of the trial court nor the decision of the Supreme Court of Georgia conflict with decisions of this Court regarding the question of whether just compensation includes the value of improvements made before filing of condemnation proceedings by a local governmental entity. Rather Petitioner merely challenges the application of a well-established decision of this Court to the particular facts of this case.

ARGUMENTS & AUTHORITIES

I.
REASONS FOR DENIAL OF WRIT OF CERTIORARI.

This case presents no novel question of law. It is a dispute about whether just compensation includes the value of improvements made by a local governmental entity. The decisions of the trial court and the Supreme Court of Georgia involved no important question of federal law which has not been, but should be, settled by this Court, nor did it decide a federal question in a way that conflicts with applicable decisions of this Court.

Contrary to the contention of Petitioner, there are no constitutional questions. Petitioner's claims of violation of rights to equal protection and due process are based on the erroneous assumption that the facts of this case required the Georgia courts to apply issue preclusion in a condemnation action following judgment in an ejectment action. Since there is no basis for issue preclusion, there is no basis for Petitioner's constitutional claims.

II.
JUST COMPENSATION DID NOT INCLUDE THE VALUE OF THE IMPROVEMENTS CONSTRUCTED ON THE PROPERTY BEFORE FILING OF THE CONDEMNATION ACTION.

Petitioner Durden contends that construction of the garbage collection facility on the 7-acre tract before condemnation with knowledge of her claim of ownership, amounted to bad faith by DeKalb County and, for that reason, the condemnation award should have included the value of the improvements. However, this Court long ago held otherwise. Construction of improvements on property by a condemnor, before condemnation takes place, with knowledge of a competing claim is not evidence of

bad faith. *Searl v. School District No. 2,* 133 U.S. 553, 10 S.Ct. 374, 33 L.Ed. 740 (1890).

In *Searl,* a school district, which had the power of eminent domain, erected a new school building on property, erroneously believing it owned the property. Later the school district had to condemn the property. The Court concluded that "the value of the improvements could not justly be included in the compensation." In so doing the Court held

> The [trial court] was not dealing with an action of ejectment or trespass, but simply with a proceeding in the exercise of the right of emiment domain. That right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it. [Cits.]. The occupancy here was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual nor were the circumstances such as to impart the character of willful trespass to the entry by the district. . . . 133 U.S. at 562.

This Court went on to describe good faith as "a freedom from a design to defraud the person having the better title" and to state that knowledge of an adverse claim or lien does not indicate bad faith in a purchaser "unless accompanied by some improper means to defeat such claim or lien." 133 U.S. at 564.

The Supreme Court of Georgia, in affirming the trial court's ruling in favor of the County excluding the value of the garbage facility, based its decision squarely on *Searl*, holding

> Had the County been a "naked trespasser" with no "shadow of right" to the property when it entered Durden's property and began construction, then it would be necessary for the County to pay Durden the value of the improvements in the subsequent condemnation. See *Searl*, 133 U.S. at 561-62. However, in this case DeKalb County's initial entry on the property was lawful, as it held a valid tax deed to the property at that time. Therefore, we find that the trial court correctly concluded that Durden is not entitled to the value of the improvements, even though the County knew of Durden's competing claim and its title was ultimately held to be invalid. (Appendix to Petition for Writ of Certiorari, p. 11a.)

The Georgia court also quoted with approval the following from the decision of the trial court:

> Any contrary ruling would require the condemnor to pay twice for the improvements which it constructed and would provide the condemnee a windfall. Condemnee Durden has offered no other evidence of bad faith on the part of the Condemnor [DeKalb County], and there is no evidence whatsoever that Condemnor believed itself to be anything other than the rightful owner of the property until the decision in the ejectment action in January of 1990. Since notice of an outstanding or competing claim is not evidence of bad faith which would permit a condemnee to recover the value of improvements constructed by the condemnor and reap a windfall, Condemnor is entitled to judgment on its motion. (Appendix to Petition for Writ of Certiorari, p. 11a.)

Searl was an early departure from the common law rule that a trespasser who built a structure on another's land impliedly dedicated the structure to the landowner. Georgia courts held, even before *Searl,* that the trespasser doctrine does not apply where a condemnor constructed improvements before condemnation under a mistaken, but good faith, belief that it owned the land. In *Young v. McKenzie,* 3 Ga. 31 (1847) a bridge company had only to pay for the value of the land and not for a bridge mistakenly constructed before a valid condemnation. In *Charleston & W. Carolina Ry. Co. v. Hughes,* 30 S.E. 972 (1898) the Supreme Court of Georgia held that "harsh remedies," i.e., the common law rule of forfeiture, will not be allowed against a railroad company having the right of eminent domain and that under its power of eminent domain, the railroad had a right to do acts which would be a trespass for an individual.[3] In *Benton v. Georgia Marble Co.,* 364 S.E.2d 413 (1988), a proceeding by a railroad to condemn a railway line upon expiration of the railroad's lease, the owners were not entitled to compensation for the value of the leasehold improvements made by the Railroad. *Id.* at p. 415.

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[3]The *Hughes* court also held that an owner who stands by and allows improvements for the public good to be erected on the owner's property cannot recover the value of the improvements. The Georgia trial court in granting the County's motion for partial summary judgment made an explicit finding that Petitioner Durden was aware that the County was constructing the garbage collection facility but chose to take no action in an effort to either prevent or delay such construction "apparently in the hope that it would increase the damages which she might recover." The trial court cited this finding of fact as an alternative ground for granting the County's motion for partial summary judgment. (See Appendix for Petition for Certiorari, p. 17a.)

Several federal cases more recent than *Searl* are consistent with *Searl* and the Georgia decisions. See *Anderson-Tully Co. v. United States,* 189 F.2d 192 (5th Cir. 1951), cert. denied, 342 U.S. 826 (1951); *Bibb County, Georgia v. United States of America,* 249 F.2d 228 (5th Cir. 1957); *Alaska v. 13.90 Acres of Land,* 625 F.Supp. 1315 (D. Alaska 1985) aff'd sub nom. *Etalook v. Exxon Pipeline Co.,* 831 F.2d 1440 (9th Cir. 1987).

In *Etalook,* supra, a pipeline company condemned land as part of the Alaskan pipeline project and constructed a road over what turned out to be land owned by a native Alaskan. The pipeline company settled with the owner of the land.

After construction commenced, the owner succeeded in overturning the condemnation proceeding and the settlement. The company then initiated a new condemnation proceeding to perfect the errors in the previous proceeding. The federal court upheld the trial court's refusal to include the value of the improvements erected by the company in the measure of just compensation. First, the court held that the common law rule concerning trespassers did not apply to an entity with power of eminent domain. Second, the common law forfeiture rule had been modified by a state statute to allow one who held title in good faith and under color of title to set off the value of improvements against the damages for trespass. Third, the court held that the Condemnee would be required to pay the trespasser for the value of improvements when he stands by while the trespasser improves the property. *Id.,* at 1445.

All three factors set forth in the *Etalook* decision apply to the present case. First, Georgia law does not treat the condemnee as a mere trespasser. Second, Georgia statutory law (O.C.G.A. §44-11-9) also abrogated the

common law rule and now allows even a private trespasser who holds under color of title and in good faith to recover the full value of any improvements it erects while in possession. In addition, as the trial court specifically found, Petitioner Durden did not take any action to stop the County from building the garbage collection facility on the 7-acre tract and cited that fact as an alternative ground for concluding that Petitioner Durden could not recover the value of the improvements.

In summary, the trial court and the Supreme Court of Georgia following the decision of this Court in *Searl,* and other federal and Georgia decisions consistent with *Searl,* correctly concluded that Petitioner Durden is not entitled to the value of the improvemets, that any contrary ruling would require the County to pay twice for the public improvements without any evidence of bad faith and would provide Petitioner Durden with a windfall. Thus, the trial court and the Supreme Court of Georgia followed the admonition of *Searl* that just compensation must be just to the taxpayers of the County as well as Petitioner Durden.

III.

THE DECISION IN THE EJECTMENT ACTION DID NOT PRECLUDE THE TRIAL COURT'S FINDING OF NO BAD FAITH IN THE SUBSEQUENT CONDEMNATION ACTION.

Petitioner Durden attempts to bypass *Searl,* and the other federal and Georgia decisions consistent with *Searl,* with an argument to the effect that the act of the County in constructing the improvements on the 7-acre tract during the pendency of the ejectment action was *ipso facto* not a good faith act, i.e., bad faith as a matter of law. (Petition for Certiorari, p. 13.) In support of this argument Petitioner cites *Harper v. Durden,* 170

S.E. 45 (1933); *Zugar v. Tennessee A&G Railway Co.*, 65 Ga. App. 658, 16 S.E.2d 149 (1941); *rev'd.* 193 Ga. 386, 18 S.E.2d 758 (1942). Neither of these decisions support Petitioner Durden's argument. In *Harper* the Supreme Court of Georgia held that:

> One may be the possessor of land in good faith, though aware of an opposing claim (where such knowledge would not of itself impute bad faith), if he enters in full confidence of his title or the title of one under whom he immediately claims. . . . *Id.* at P. 48-49.

In *Zugar,* the Georgia Court of Appeals did hold that defendant's cutting of trees while suit was pending made his trespass willful and not in good faith. However, the Georgia Supreme Court reversed that decision and held "notice or knowledge of an adverse claim does not destroy the bona fide character of a reasonable and honest claim by one in possession unquestionable." *Id.* at 762. And on remand, the Court of Appeals vacated its entire opinion. *Zugar,* 19 S.E.2d 436 (1942).

Harper and *Zugar* are directly contrary to the *ipso facto* argument made by Petitioner. Thus, the fact that the County began construction of the facility after the ejectment action was filed does not constitute bad faith *ipso facto,* i.e., as a matter of law.

Petitioner also argues that the judgment against the County in the ejectment action is res judicata as to the "issue of good faith versus bad faith" in the condemnation action. (Petition for Certiorari, p. 15.) Here, Petitioner is arguing issue preclusion:

> In Georgia, the prerequisites to the application of the doctrine of issue preclusion are: (1) that the issue at stake be identical to the one involved in the prior litigation; (2) that the issue has been actually

> litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in the earlier action. *Nix v. Hardison*, 712 F.S. 185, 189 (N.D.Ga. 1989).

Since issue preclusion is an affirmative defense, Petitioner has the burden of proof and must establish the identity of issues with "clear proof" without the identity of issues being uncertain, indefinite or based on inference. *Glen Oak, Inc. v. Henderson*, 369 S.E.2d 736, 738-39 (Ga. 1988). Petitioner fails to carry that burden of proof. Clearly good faith was an issue in the condemnation action, with the trial court making a specific finding that Petitioner had offered no evidence of bad faith on the part of the County. However, there is nothing in the ejectment judgment or elsewhere in the record of this case to suggest that the issue of bad faith versus good faith was litigated in the ejectment action or that the trial court gave any consideration to such issue in concluding that the tax sale was an excessive levy. Consequently, the decision in the ejectment action did not preclude the trial court's finding of no bad faith on the part of DeKalb County in the subsequent condemnation action and the application of *Searl* to the facts of this case, and no basis exists to support Petitioner's claim that a misapplication of the principle of res judicata by the state courts violated her rights to due process and equal protection. There being no such constitutional support, the conclusiveness or not of a state court judgment is solely a concern of state law. *Koningsberg v. State Bar of California*, 366 U.S. 36, 4481 S.Ct. 997 (1961).

CONCLUSION AND PRAYER

This case presents no question other than the application of a well-established decision of this Court to the facts of this particular case. Accordingly, Respondent prays that the Court deny the Petition for Writ of Certiorari on the grounds that the decisions of the trial court and the Supreme Court of Georgia were not in error and that the case presents no issue appropriate for the Court's review.

Respectfully submitted,

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September 9, 1994

APPENDIX I

Order in ejectment action granting plaintiff Durden's motion for summary judgment

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE
NO. 87-1136-3

LIZZIE DURDEN, ADMINISTRATRIX OF THE ESTATE OF MARY FREEMAN (DECEASED),

Plaintiff,

v.

DEKALB COUNTY, GEORGIA,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1. Plaintiff is the successor-in-interest to the Jim and Mary Freeman named in that certain Warranty Deed from Dr. B.F. Anderson dated December 20, 1945 . . . .

2. The property which is the subject matter of this dispute is described in a purported tax deed held by Defendant . . .

3. [OMITTED]

4. The Defendant's sole claim to the property is by virtue of the aforesaid tax deed. The tax deed resulted

from a tax execution which issued against a George Anderson who had filed a real property tax return on the Subject Property in 1959. The tax execution was for 1974 and 1975 taxes on the Subject Property.

5. The Subject Property is a 30 acre tract . . . . According to the 1975 tax digest, the County Board of Tax Assessors had placed an actual fair market value on the Subject Property in excess of $30,000.00.

6. The Tax Commissioner of DeKalb County levied upon and sold the entire 30 acre tract for the sum of $780.49. This levy on 30 acres to satisfy a $780.49 tax bill constituted an excessive levy as a matter of law.

7. The tax deed . . . issued pursuant to an excessive levy is void and, therefore, the Defendant's tax deed is void.

8. The Subject Property was vacant land at the time this suit was filed.

9. Plaintiff, by virtue of the Warranty Deed and prior possession of the Subject Property, is entitled to prevail in its action for ejectment as a matter of law.

Based on the foregoing findings, Plaintiff's Motion for Summary Judgment is GRANTED and it is

ORDERED AND ADJUDGED that Plaintiff have and recover the possession of [the Subject Property] over and against the Defendant; that a Writ of Possession issue instanter . . . .

IT IS SO ORDERED this 31st day of January, 1990.

/s/ Clarence F. Seeliger
CLARENCE F. SEELIGER, JUDGE
Stone Mountain Judicial Circuit